

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE

DOE 1, DOE 2, and KASADORE)
RAMKISSOON, on Behalf of)
Themselves and all other Persons)
Similarly Situated,)
)
Plaintiffs,)
)
vs.) NO. C 06-05866 SBA(JCS)
)
AOL LLC,)
)
Defendant.) San Francisco, California
) Friday
) December 3, 2010
) 10:23 a.m.

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Official Reporter - U. S. District Court

1 APPEARANCES CONTINUED

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5 **BY: ANDREW G. HORNE**
6 **JOSEPH SERINO, JR.**

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1 **THE COURT:** Hello, everyone.

2 **THE CLERK:** Hello. This is Karen, with Judge Spero's
3 chambers. And we're here for the *Doe versus AOL* matter.

4 I have one housekeeping issue. We need to make sure
5 that you speak up loudly and clearly, and identify yourself
6 each time, because I do have a court reporter here. And, since
7 you're all appearing by phone, you need to really speak up and
8 identify yourselves. So, with that said, appearances, please.

9 **MR. DOMINGUEZ:** Manuel J. Dominguez, for the
10 plaintiffs, from Berman De Valerio.

11 **MR. ORENSTEIN:** Nathaniel Orenstein, for plaintiffs,
12 at Berman De Valerio, as well.

13 **MR. HORNE:** Andrew Horne, of Kirkland & Ellis, for
14 the defendant. I have here with me my partner, Joe Serino.

15 **THE COURT:** All right. Thank you, everyone. Thank
16 you for the excellent letter.

17 I thought I would go through and give you my
18 tentative thoughts, and then take some brief argument on the
19 matter.

20 Just going down the list of issues with respect to
21 the e-mails to or from -- yeah -- AOL employees, between AOL
22 employees and the Legal Department regarding advice or approval
23 of the research.aol.com website, those are clearly privileged
24 materials from the description in the letter.

25 There are two ways in which the privilege is

1 potentially waived in this instance. The first would be if the
2 matters -- if a substantial portion of those communications --
3 a significant part of the communication was revealed to a
4 non-party to the communication.

5 That has not happened in this case.

6 And so the remaining argument on waiver is whether or
7 not the defendants have put the content of those
8 communications -- the fact of the communications is not
9 privileged. Presumably, you'll have a privilege log. The fact
10 of those communications -- the content of the communications
11 was the content at issue. There's no evidence before me that
12 the defendants have taken a position in this case which puts
13 the content of those communications at issue; there might be at
14 some point. And so I suppose it could still be the case that
15 at some point, the defendants might take a position that -- in
16 the case that is inconsistent with the assertion of the
17 attorney-client privilege. You know, it would have to be
18 something more than something that implicates just the fact of
19 the communication. It would have to be something that
20 indicates that the tenor of the advice sought or received is at
21 issue. And so far, you know, on this record, there is no such
22 thing with respect to this lawsuit.

23 As a cautionary note, I think it's very easy to slide
24 over that line in this lawsuit. So I wouldn't say this is a
25 for-all-time ruling; but for now, I would deny it with respect

1 to the production of those e-mails.

2 With respect to the documents created by and
3 concerning the privacy task force, I understand that there is
4 a -- this may or may not still be an issue. I don't know.
5 There was, apparently, a list of -- privilege log produced. It
6 is the defendant's obligation to review that; to go back and
7 look at that log, and examine it, and make sure that they are
8 asserting privilege properly.

9 My view in that connection guides you in your review
10 of those documents -- is that not every document concerning the
11 Privacy Task Force or generated by the Privacy Task Force will
12 be privileged. The Privacy Task Force clearly had both
13 business as well as legal purposes. So, number one, I don't
14 see any evidence that would justify the assertion of work
15 product in this case; but, number two, with respect to
16 attorney-client privilege, unless the communication is between
17 a lawyer at the firm -- a lawyer at the company and someone
18 else at the company concerning legal advice, then I'm not
19 prepared to call it "privileged."

20 It is -- that's especially the case in a circumstance
21 as this, where there is a mixed purpose for a task force. It
22 would have to be limited to -- those privileges are limited to
23 those communications that actually are either seeking or giving
24 legal advice, but I would charge the defendants with going back
25 through, and figuring out, with that guidance, what's left.

1 The rest should be produced. If there are some left and
2 there's still disagreement on them, well, then we can talk
3 about those.

4 With respect to consumer complaints, this has got to
5 be the most ironic of the requests in a lawsuit filed by one
6 Doe One. To seek the identity of the consumers is -- is
7 ironic, to say the least.

8 I don't see, to be quite serious for a moment,
9 however, how the identity of the consumers who complained or
10 had a comment about this service will help you prove that you
11 can identify those individuals; that you can identify
12 individuals from the search data that was released. I just --
13 that nexus, seems to me, to be completely lacking. So I don't
14 really understand the argument about why the identity of every
15 consumer who complained has anything to do with what you're
16 trying to accomplish from it.

17 With respect to document AOLR00413013A -- this is a
18 document from the Security Group to counsel. That is a
19 communication that the evidence indicates was prepared at the
20 request of counsel, so that counsel could give legal advice. I
21 would sustain the privilege as to that.

22 With respect to the documents used to refresh
23 recollections at a deposition, you know, I'm astounded at how
24 lawyers use that argument or don't use that argument. If a
25 person has their recollection refreshed, if it is, in fact,

1 refreshed, then you get to see the basis for that. You don't
2 get to see it just because at some point they saw it.

3 So otherwise, the selection of documents shown a
4 witness is -- is -- highly protected work product, and I would
5 protect it. So I deny productions of those.

6 I would deny the motion for sanctions, as premature.
7 There hasn't been a sufficient showing that the requested
8 documents ever existed in the beginning of the litigation in
9 the custody of the defendants; no showing how they came to be
10 missing. So there's no way to even talk about fault.

11 Go ahead and take whatever deposition you want on
12 this subject, but you're going to have to have a much more
13 substantial showing than a letter to justify sanctions.

14 My tentative on the search of the custodians' files
15 would be to grant that part of the motion. I think that there
16 is -- and we're talking basically about backup tapes that have
17 custodians' files on them. In my judgment, the burden of the
18 fact that not every custodian at AOL follows a uniform
19 retention policy falls on AOL. So I would cause them to search
20 the backup tapes for those records of those custodians, and the
21 same -- for the same scope and same time period that they
22 searched the computers of those custodians. So that's my
23 tentative.

24 I've got a roomful of folks here, waiting for the
25 criminal calendar. So I will take five minutes of argument

1 from each side, starting with plaintiff.

2 **MR. DOMINGUEZ:** Your Honor, I just wanted to argue
3 about the --

4 **THE COURT:** Could you identify yourself, please?

5 **MR. DOMINGUEZ:** I'm sorry, your Honor. It's
6 John Dominguez.

7 I just wanted to talk about the consumer complaints,
8 and tell you --

9 (Reporter requests clarification)

10 **MR. DOMINGUEZ:** John Dominguez, from
11 Berman DeValerio, on behalf of the plaintiffs.

12 I just wanted to take this opportunity to explain a
13 little bit about why the consumer complaints were important to
14 us, for purposes of identifying individuals. In the -- in
15 their arguments to us, in the -- in the -- for class, and as
16 part of this case, you know, they have they have set out and
17 said,

18 "Well, you can't identify a class.

19 It's impossible to identify the class,
20 because you don't have user names."

21 They've also had an expert come down and say you
22 can't determine who's in this group, based on the data.

23 The identification of people -- of these consumers
24 would be important, because it would allow us to be able to
25 determine whether you can, in fact, take the data that was

1 there, and show that people can be identified. And you can do
2 that by using this sample of people who are complaining about
3 their information being put out on the Internet.

4 **THE COURT:** Well, let's start with that.

5 I didn't understand the request to be limited to
6 people complaining that their data was being put out in the
7 Internet. Is that the limitation?

8 **MR. DOMINGUEZ:** Yes, your Honor.

9 **THE COURT:** Okay. So you're only seeking people who
10 have filed a complaint, saying their data was sought on the
11 Internet. And how many people are in that sample?

12 **MR. DOMINGUEZ:** It's hard for me to say. I know in
13 the letter, we cited a number of documents; but it would be --
14 I don't think it's a lot. I would say it's hundreds, but it is
15 quite a few people.

16 **THE COURT:** And does your expert -- and so this data
17 presumably was collected over a significant period of time, and
18 presumably covered many, many thousands, if not hundreds of
19 thousands, of people searches.

20 And you think that you will be able to demonstrate
21 from a tiny group of 50, a hundred, a couple hundred people,
22 that you can identify from that data, on anything resembling a
23 class basis or anything else, whose information was exposed? I
24 guess I don't understand that argument.

25 **MR. DOMINGUEZ:** Well, because, for instance,

1 your Honor, not to get overly complex, but this was created
2 by -- this database that was created, was created by what's
3 called "hash numbering." There is -- appears to be evidence
4 that hash this type -- in other words, they want to say that
5 the -- that the data -- anonymize it. They want to basically
6 say that the data -- there's no way for you to be able to know
7 who these persons are, because they've sufficiently secured the
8 information.

9 So we're trying to say there seems to be some
10 evidence that we're trying to explore as part of our expert
11 report that this process could be reversed. And one way to be
12 able to test that would be to get this information about
13 consumers, to see if we can make that claim, your Honor.

14 **THE COURT:** Well, but I -- I guess I don't understand
15 the connection.

16 The people who complained -- first of all, it's a
17 really small group. So I'm not sure that scientific basis --
18 it's of any use to you; but assuming that it is, the consumers
19 who complain don't know that they -- their data was even
20 included in that group. Right?

21 **MR. DOMINGUEZ:** You're correct, your Honor, that that
22 would be not the type of data that I would be using.

23 The complaints that -- some of ones that I was able
24 to review -- and I'm not speaking for all of those, because
25 it's difficult for us to know. The data that we were looking

1 for would be data from those individuals who were actually
2 complaining about this. "This is me. This is -- I -- I am on
3 the Internet," you know. That's the type of data that we would
4 be looking for.

5 **THE COURT:** So you actually want complaints from
6 individuals who have stated in their complaint that they have
7 identified themselves in the research data?

8 **MR. DOMINGUEZ:** Yes, your Honor.

9 **THE COURT:** Complaints.

10 Okay. So let me turn to AOL, and ask them: Why
11 isn't that directly relevant?

12 **MR. HORNE:** Your Honor, I think you have hit the nail
13 on the head on a whole lot of points there.

14 The first the group would be so small, that it would
15 be unscientific to use the data for any purpose. And, frankly,
16 your Honor, sitting here, I'm not sure there are any people in
17 the category that plaintiffs are trying to limit their
18 complaints to; but even beyond that, the fact that someone has
19 purportedly self-identified is not really the issue here.

20 The question is whether or not someone else can
21 reverse-engineer the data, in order to identify someone. And
22 that's really what plaintiffs are going to have to show, and
23 are trying to show here. And they haven't done that -- enable
24 someone who puts up their hand and says, "Yes, maybe my
25 searches were disclosed," isn't going to help them show you can

1 actually reverse-engineer this data. There's apparently no
2 link between the self-identification and issues in the case.

3 **THE COURT:** Okay. Does AOL want to say anything else
4 about the tentative?

5 **MR. HORNE:** No, your Honor, except for one small
6 issue on the two aspects of the tentative, where you have
7 ordered AOL to, first of all, go back and look at the privilege
8 log and the Privacy Task Force, and then also go back to the
9 backup tapes --

10 **THE COURT:** Mm-hm.

11 **MR. HORNE:** -- we'd ask for 14 days, in order to do
12 that.

13 **THE COURT:** Any objection to that?

14 **MR. DOMINGUEZ:** No, your Honor.

15 **THE COURT:** All right. So here's what I'm going to
16 do. Within 14 days of today, I'm going to require that AOL
17 produce the consumer complaints where the consumer states that
18 they have identified themselves in the data issue; within 14
19 days of today, I'm going to have AOL look at the privilege log,
20 with the guidance I have given on the record here today; and,
21 number three, review the backup tapes for the custodians, and
22 produce the responsive documents.

23 **MR. HORNE:** This is Andrew Horne, for AOL.

24 When you say, "review the backup tapes for the
25 custodian," are you referring to the custodians who are

1 identified in Exhibit 1 to the plaintiffs' letter?

2 **THE COURT:** No, I am not.

3 You searched, in this case, a number of custodians.

4 And you did it however you did it.

5 The sampling of -- that's -- well, I'm not sure what
6 I am talking about, now that I think about it.

7 Yes. I think what I mean is that, with respect to
8 the custodians listed on the exhibit, you should review the
9 backup tapes.

10 **MR. HORNE:** Thank you, your Honor.

11 **THE COURT:** Okay. Thank you very much.

12 **MR. DOMINGUEZ:** Thank you, your Honor.

13 **MR. HORNE:** Thank you, your Honor.

14 **THE CLERK:** Court stands in short recess.

15 (At 10:42 a.m. the proceedings were adjourned)

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CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 06-05866 SBA(JCS), *Doe v. AOL, LLC*, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Lydia Zinn, CSR 9223, RPR

Thursday, March 22, 2012